Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-823

WEYERHAEUSER COMPANY, a Washington corporation,

Petitioner,

v.

PATRICIA ANN SHEPLER, Individually and as Personal Representative of the Estate of Oren D. Shepler, Deceased,

Respondent.

and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reasons Why The Writ
Should Not Be Granted

This is not an appropriate case for certiorari, either to determine the scope

of duty owned by shipowners or charterers to longshoremen under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), or to consider whether a longshoreman's third party recovery should be reduced by the negligence of his stevedore employer under a so-called "equitable credit" or "Murray credit" rule.

The record below is not an appropriate vehicle for consideration of either of these issues. The Petitioner (hereafter, "Weyerhaeuser") retained active control over the loading of the vessel which it had chartered, and its refusal to authorize the use of safe loading equipment was responsible for Mr. Shepler's death. As the decision of the Oregon Supreme Court accurately states:

> "Under any duty thus far suggested by federal decisions, if the employer of an independent contractor dictates a particular method for performing the contracted work which is unreasonably dangerous to the workman of the independent contractor, taking into consideration the possible alternative methods, he is responsible in damages for injuries caused to such workman thereby. This is a duty to the employees of an independent contractor which is universally imposed upon the employer of such a contractor in any context, whether on land or at sea, and about which there can be no real argument." (Petition, A-62.)

There is no conflict among the Circuit Courts of Appeal with respect to a tortfeasor's liability for the kind of negligent conduct involved in this case. All of the federal decisions which have construed the 1972 amendments to the LHWCA are in agreement that a shipowner's active participation in loading or unloading a

vessel subjects him to liability for injury attributable to his own negligent acts or omissions. Butler v. O/Y Finnlines Ltd., 537 F.2d 1205 (CA 4, 1976); Brown v. Ivarans Rederi A/S, 545 F.2d 854 (CA 3, 1976); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1251-1252, ftn. 39 at 1252 (CA 3, 1977); Anderson v. Iceland Steamship Co., 431 F. Supp. 869 (D. Mass., 1977); Julien v. Lykes Bros. Steamship Co., 1977 AMC 241 (E.D. La., 1976).

Weyerhaeuser is a lumber and logging company which operates a huge mill and port facility at Longview, Washington. In 1972, Pacific Coast Shipping Co. and Weyerhaeuser executed a "Beizai (American Logs/Lumber)" voyage charter of the vessel PACKING under the terms of which Weyerhaeuser retained authority to "load,

stow and discharge the cargo free of risks and expenses to owners." (Pl.Ex.12; Tr.72-75) Weyerhaeuser hired a master stevedore to do the actual work of stowing logs, but had both a loading superintendent and a supercargo working about the vessel, and these supervisory employees exercised actual control over the selection of logs and method of loading (Tr.49, 530, Def. Ex.44, 432-435, 178-188, 194, 440-443, 229).

Longshoreman Oren Shepler was killed aboard the PACKING at Weyerhaeuser's Longview dock during a voyage of the vessel PACKING under the Beizai charter. During that voyage, Weyerhaeuser experimented with stretching the log-carrying capacity of the PACKING beyond previous limits (Tr.75, 76; Ex. 13-16; Tr.75-90, 111-112, 179-180, 435).

Weyerhaeuser's insistance upon a full stow was complicated by the problem that on the vessel PACKING, unlike most modern log ships, the No. 1 hatch opening (or "square") was much smaller than the fore and aft dimensions of the hatch itself, which made it difficult to stow logs under deck (Tr.113-114, 211, 221, 229, 232, 335, 453, 113, 235, 337, 188). Moreover, the logs supplied by Weyerhaeuser from its Longview log yard were of the wrong length for the hatch (Tr.118, 182, 183, 454-455).

Because of the conditions created by the shape of the hatch, the uneven logs, and Weyerhaeuser's insistance upon a full stow with no waste space, the only adequate method of accomodating Weyerhaeuser's demands was to use a stowing machine (or "bull winch")(Tr.112-113,

116-117, 230, 234, 235, 238, 239, 336, 337). A bull winch (which is a small "donkey" engine designed to pull logs about in a hold), would have required more manpower and would have increased Weyerhaeuser's cost of loading the vessel (Tr.116, 239). A stevedore vice president called Weyerhaeuser's manager of cargo operations, requested permission to use bull winches, and discussed the extra cost, after which Weyerhaeuser vetoed their use (Tr.116-117, 525-526, 182-183, 238-239, 336, 337).

Longshoremen were then compelled to stow logs into the No. 1 hatch of the vessel as best they could without stowing machinery, which caused a hole approximately 28 feet deep to develop between the aft bulkhead and load of logs (Tr.114, 337,

169, 347). Because of Weyerhaeuser's insistance on a tight stow, longshoremen were required to work near the hole using a procedure known as "dead-ending." While Shepler was engaged in this procedure, he slipped, fell to the bottom of the hold, and was killed (Tr.117-118, 313, 443-444, 241-242, 255-258, 297-302, 242, 311-318, 217-219, 365).

All of this work went forward with the knowledge and participation of Weyerhaeuser's loading superintendent and supercargo. Weyerhaeuser's supercargo testified that if it had not been for Weyerhaeuser's insistance upon a tight stow, the longshoremen need not have worked about the open hole (Tr.183, 184), and that the hole could have been filled if stowing winches had been used (Tr.183,

184). Weyerhaeuser's loading superintendent and supercargo both admitted that they knew of the hole between the stow and the aft bulkhead and that longshoremen were dead-ending logs (Tr.184, 448, 456, 460), a procedure which the supercargo conceded was dangerous (Tr.184), but which many witnesses testified was necessary in view of Weyerhaeuser's insistance upon a tight stow (Tr.118, 184-195, 228, 235-239, 313, 321).

Weyerhaeuser's active supervision of the work, its refusal to authorize the use of safe equipment, and its insistance that longshoremen provide a tight stow even though this could not be done safely with the tools available, constituted misconduct which would be actionable under <u>any</u> view of maritime negligence,

and presents no issue which merits review by this Court.

Petitioner's further request that this Court grant certiorari to determine the applicability of a so-called "equitable credit" or "Murray credit" to reduce respondent's recovery by the percentage in which the stevedore employer was negligent, finds no support in the record. Weyerhaeuser failed to raise the issue in the trial court, a fact reflected in the record and conceded by Weyerhaeuser's counsel on oral argument before the Oregon Supreme Court. Normally, application of an "equitable credit" doctrine would deny the stevedore employer recovery of its workman's compensation lien. Not only did Weyerhaeuser fail to raise the defense of "equitable credit" in the trial court, it failed to give the decedent's

stevedore employer any notice of such a defense, in order that the employer might be joined as a party or petition for intervention to protect its interests.

Under such circumstances, the Oregon Supreme Court declined, upon adequate state grounds, to apply an "equitable credit" defense. That court held:

> "***[W]e decline to apply [the equitable credit doctrine] in this case for the following reasons: (1) It appears to us to be exactly contrary to the Reports and would permit the shipowner in effect to obtain indemnity indirectly and reduce the stevedore's lien against the compensation under the Act; (2) A majority of the federal courts of appeal which have considered the question have rejected application of the doctrine. Included in these are the Ninth Circuit. See Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert den 96 S Ct 1668 (1976). In the Fourth Circuit, which did apply the doctrine, there was a vigorous and able dissent by one of the

three judges of the panel which heard the case. See dissenting opinion of Circuit Judge Hall, Edmonds v. Compagnie Generale Transatlantique, ___ F2d ___ (4th Cir. 1977); (3) On the face of it it seems unfair to have the stevedore's percentage of negligence determined in a case in which the stevedore is not a party and has no power to control any portion of the presentation of evidence upon which the trier of fact assesses the stevedore's percentage of negligence or fault; (4) There is no assignment of error before us as to any ruling made by the trial judge upon this point. Insofar as we can tell from the record, the trial judge was not asked to do what defendant would now have the court do." (Petition, A76, 77)

It would be contrary to the practice of this Court to grant certiorari where the decision below is based upon adequate state grounds.[1/] Nor will this Court

1/ Mr. Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Ass'n Quarterly, 393, 399-400 (1960).

grant certiorari to review a federal claim arising in a state court proceeding where the highest court of that state has held, in good faith, that the claim was not timely asserted. Hartford Life Ins. Co. v. Johnson, 249 U.S. 490 (1919).

Moreover, there is no present conflict among the Circuit Courts of Appeal on the "equitable credit" or "Murray credit" issue. The Second, Fifth and Ninth Circuits have rejected the defense, and this Court has several times denied certiorari to review the question. Landon v. Leif Hoegh & Co., 521 F.2d 756 (1975), cert den sub nom A/S Arcadia v. Gulf Ins. Co., 423 U.S. 1053, reh den 424 U.S. 935 (1976); Dodge v. Mitsui Shintaku Ginko, KK Tokyo, 528 F.2d 669 (CA 9, 1976), cert den 425 U.S. 944 (1976); Shellman v. United States Lines, Inc., 528 F.2d 675 (CA 9, 1975),

cert den 425 U.S. 936 (1976); Albert v. Paulo, 552 F2d 1139 (CA 5, 1977). A form of "equitable credit" was approved by a three judge panel of the Fourth Circuit in Edmonds v. Compagnie Generale Transatlantique, 558 F2d 186 (CA 4, 1977), (with one judge dissenting), but the Fourth Circuit has granted a rehearing and no decision has yet issued.

Conclusion

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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